

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

4 UNITED STATES OF AMERICA,

5 Government,

HONORABLE GEORGE CARAM STEEH

6 v.

No. 16-20098

7 KHALIL ABU-RAYYAN,

8 Defendant.

9 EXCERPTS OF SENTENCING HEARING

10 Monday, March 26, 2017

11 - - -

12 APPEARANCES:

13 For the Government:

RONALD W. WATERSTREET, ESQ.  
Assistant U.S. Attorney

14  
15 For the Defendant:

TODD A. SHANKER, ESQ.

16 - - -

17 *To Obtain Certified Transcript, Contact:*  
18 *Ronald A. DiBartolomeo, Official Court Reporter*  
19 *Theodore Levin United States Courthouse*  
20 *231 West Lafayette Boulevard, Room 238*  
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N O N E

1  
2 Detroit, Michigan

3 Monday, March 26, 2017

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5 **THE COURT:** Mr. Shanker?

6 **MR. SHANKER:** Thank you, your Honor.

7 Your Honor, the first thing that I want to point  
8 out is that we've heard a number of basically Khalil's  
9 worst statements that he made to the undercover Jannah,  
10 the second undercover, and I think it's interesting that  
11 Mr. Waterstreet is -- the government is basically saying,  
12 well, these are all true. These are true statements, true  
13 intent, and once again, the evidence -- other evidence in  
14 this case all indicates to the contrary.

15 We have Dr. Tillbrook, government's own expert.  
16 He found that Khalil -- that these were false statements.  
17 He found that Khalil was credible in what -- in his  
18 explanation of why he was making these statements to  
19 Jannah. He said that he did not -- he found that he did  
20 not have the intent to harm anybody, and he talked about  
21 just how uncomfortable Khalil was at that point in his  
22 life, and we have to put this into perspective.

23 You know, he was -- had been arrested for the  
24 first time in his life and charged. So he was facing  
25 that. He had just gone through, what for him, was the

1       greatest love relationship of his life with the  
2       government's first undercover Ghadda, who suddenly  
3       disappeared when the family was getting ready to go down  
4       and visit the undercover family in Columbus, Ohio.

5               So there was no question that there was a lot of  
6       stress going on with Mr. Rayyan, and there's no doubt as  
7       all the experts in the case pointed out, he was suffering  
8       from depression, the substance abuse elements going on,  
9       but the major point here is he did not intend to hurt  
10      anybody. He was saying things that Jannah wanted to hear,  
11      and that's why I really right now want to correct the  
12      timeline that the government just gave about Jannah's --  
13      you know, he basically says that she doesn't even talk  
14      about committing jihad until late January. That is  
15      absolutely inaccurate.

16             We have submitted transcripts in our prior motions  
17      from December. In December, Jannah tells Khalil that she  
18      is ready to commit jihad. She says why? She says my  
19      husband was killed by anti-ISIS forces in Syria, and then  
20      there's a very emotional moment -- again, this is a month  
21      before the government is talking about. This is December  
22      2015 where she says, I just had two family members killed  
23      by anti-ISIS forces in Iraq, and she's playing up the  
24      Sunni Shite divide, and -- and so she's committed to this  
25      from the very beginning.

1           And I think it's interesting, you know, I agree at  
2     the beginning of their conversations, she says I'm not  
3     interested in marriage. I agree with that. That's  
4     exactly why Khalil started shifting his statements, and  
5     you know what, Judge? We knows that these are horrible  
6     statements, and he takes responsibility for it. They were  
7     reckless. They were scary. They are terrible statements,  
8     but he didn't intend to commit any crime on anybody. He  
9     was trying to impress her. The only way that he was  
10    getting her attention is when he joined the conversation  
11    about her family deaths at the hands of anti-ISIS forces,  
12    and her devotion to being a jihadist.

13           And what's interesting as I pointed out, and the  
14    government just left it off, is that there are numerous  
15    times in December, January and February right before the  
16    arrest where Khalil says, when she tries to get it down to  
17    brass tacks and says, are you -- are you in? She says I  
18    have a connect name, Oum Maria in Syria, and I can make  
19    this happen. Are you in or are you out? He says that  
20    he's out.

21           When he is suicidal on February 1st, and she tries  
22    to say well, you know what? Committing suicide, that's  
23    not good. That's not in accord with Islam. You need to  
24    make it into an act of jihad, and we've submitted that  
25    recording. He says, I don't want to hurt anyone else.

1                   **THE COURT:** When was that?

2                   **MR. SHANKER:** That's February 1st. So Judge,  
3 the timeline as the transcript shows is very different,  
4 and I think that's very, very important here.

5                   There was also a reference by Mr. Waterstreet to  
6 how -- well, you know, Dr. Tillbrook, all he was doing was  
7 determining whether -- all he was doing is determining the  
8 standard for civil commitment, and I think that's very  
9 interesting because civil commitment, the standard is  
10 whether he is a danger to himself or others on the  
11 outside. In a civil commitment standard, that's what  
12 we're looking at, whether somebody on the outside who is  
13 out in the public, needs to be basically put in custody  
14 against their will for treatment because they are danger  
15 to themselves other others.

16                  And the bottom line is, Dr. Tillbrook went far  
17 beyond just that finding. As I've stated, he found that  
18 Khalil did not intend to harm others, that he was a  
19 credible -- after hours and hours of conversations, after  
20 reviewing all the transcripts in the case, after reviewing  
21 the discovery in the case, all of these items for 24 hours  
22 a day observation with the staff for over a month -- he  
23 came to the conclusion that the best thing for Khalil  
24 would be community confinement -- or community treatment  
25 in a dual program where he could get mental health

1 counseling and substance abuse treatment, and that's  
2 significant. I mean, that's the government's expert  
3 there.

4 So I think it is very important to keep that in  
5 mind when I'm talking about the evidence of terrorism in  
6 the case. We have his statements, but we have expert  
7 findings that oppose that.

8 We have the search warrant. I mean, it's not like  
9 they announced two weeks ahead of time, we will be at your  
10 house and your business and your car, and go through  
11 everything that you own. So start, you know, take care of  
12 the evidence. They showed up unexpectedly. They searched  
13 everything. They took every computer, every electronic  
14 device, everything that this family owned, and they still  
15 have it, and they found nothing. Nothing to show a plan.  
16 Nothing to show that -- no guns, no knives, no ammunition.  
17 It was a completely false statement what he said, and we  
18 know that -- that he is under surveillance during this  
19 time. They are watching him the whole time, and there's  
20 no -- if they had the evidence, they could put a person up  
21 right now and say, we saw him walking around with his AK,  
22 but he didn't.

23 The other thing Judge, the government mentioned  
24 the findings of Judge Strong -- or mentioned that Khalil  
25 made that statement to Judge Strong. I'm not sure what

1 the point is there, but I think it is important what Judge  
2 Strong found because Khalil pled guilty and was sentenced  
3 after the charges were out in this case. There was a big  
4 brouhaha around February 4, 2016.

5 February 16th is when he goes in and pleads in  
6 front of Judge Strong and gets sentenced, and Judge Strong  
7 found that in listening with his knowledge of the  
8 situation, listening to Khalil's statement of allocution,  
9 and looking at the evidence in the case -- and I just want  
10 to remind the Court, this is the same gun that's involved  
11 here -- he explicitly found that Khalil did not intend to  
12 commit any kind of terrorist act; that he truly wanted a  
13 gun for self-defense purposes.

14 His statement was as follows: I believe you are  
15 remorseful, and I believe the circumstances for which the  
16 crime was committed. He has strong family ties and is  
17 working. It looks like he was trying to do the right  
18 thing, but he didn't do it the right way, but ignorance of  
19 the law is not an excuse.

20 Well, that's -- I mean, I agree with that, and I  
21 think the evidence that we now have supports that.

22 As I pointed out the last time, every time -- he  
23 only had a gun on three days during the entire  
24 investigation, and one was two days, October 7th and --  
25 5th through 7th of 2015, and that was the .22, and then



1 the other day was November 15th of 2015, again, before he  
2 is charged at the state level where he goes and tries to  
3 buy a new gun, and that doesn't go through because the  
4 initial arrest is still pending, but there's no charge.

5 And then he takes a class at the behest of his  
6 parents who told him that he should follow the law. If he  
7 wants to get a CPL, he's got to take a class and pass it,  
8 and so he takes the class afterwards. For a matter of  
9 minutes, he and his cousin fire off these big rifles with  
10 a range officer present at the range, and that's it.

11 That's the extent of his weapon possession in this case.

12 Your Honor, I also -- Mr. Waterstreet discussed  
13 the Shehadeh case, and I think the Shehadeh case is  
14 actually very supportive of our position here.

15 In Shehadeh, first off, the government properly  
16 objected to the guidelines and requested an enhancement  
17 and variance, and they did that ahead of time, and if you  
18 look at that opinion, there's a whole procedural matter  
19 that happens before they even get to the sentencing  
20 hearing, and the judge walks in and gives them notice  
21 ahead of them that he considering a variance upwards. So  
22 unlike this case, I think everything was preserved there  
23 to start.

24 Secondly in that case, there was overwhelming  
25 evidence of terrorist intent, violent intent, and most of

1 it wasn't even opposed by the defendant.

2 So, you know, there's no -- it's a completely  
3 different situation than what we have here where the  
4 evidence is weak, and there's experts opposing that  
5 evidence, and there's a search warrant that goes against  
6 any terrorist intent here. So I think that's very  
7 important when looking at Shehadeh.

8 But even more significant, your Honor, I think is  
9 the government is relying on a case in its memorandum, a  
10 Fourth Circuit case called U.S. versus Lajqi, and the  
11 government mentioned it when we last met, and mentioned it  
12 again today. That's a Fourth Circuit case, and I was  
13 curious. What are facts of this?

14 The appellate case that was cited by the  
15 government is actually a summary unpublished opinion, and  
16 it has no real facts or explanation, but it does affirm  
17 the district court's upward variance to 60 months in that  
18 case.

19 So I went back, and I found that there is a  
20 transcript of the sentencing hearing and the district  
21 court's findings that really details the reasoning, and I  
22 want to put that on the record. It's 10-CR-00502,  
23 Document 40, May 23, 2011, and again, this is U.S. v  
24 Lajqi, L-a-j-q-i.

25 So let's compare the evidence in these cases.

1 In Lajqi, the defendant, along with an informant,  
2 devised a terrorist plot, agreed to participate in the  
3 plot, and most importantly, he never withdrew from the  
4 plot. So it's not like this case where Khalil is telling  
5 the undercover, I don't want to hurt anybody. No, that's  
6 not the case in Lajqi.

7 In Lajqi, unlike this one, he actually goes and  
8 spends hours casing buildings to bomb in downtown  
9 Washington D.C. in front of witnesses. So that's  
10 evidence. This is again, I'm going through the evidence  
11 that allows a variance of this sort.

12 Third, Lajqi admitted that he was a member of a  
13 terrorist organization for years, the Kosovo Liberation  
14 Party, and he admitted over the years, he actively sought  
15 U.S. forces in Kosovo.

16 Fourth, in Lajqi, there were no expert witnesses  
17 who found that Lajqi didn't intend to commit acts of  
18 terrorism like this case.

19 Here, we have two experts, including the  
20 government's expert, and a state court judge who found  
21 that Khalil did not intend to hurt people; that he was not  
22 a substantial danger, and that he's amenable to community  
23 treatment for substance abuse and mental health  
24 counseling.

25 And finally, five, your Honor -- and this very

1 important to the judge's finding that they met their  
2 burden of proof, this was crucial -- the FBI case agent in  
3 Lajqi submitted a sworn multiple page affidavit testifying  
4 to Lajqi's dangerousness, and why, and the facts in that  
5 affidavit were largely uncontested by the defendant.

6 So for all of these reasons, none of which are  
7 present in this case, the district court in Lajqi found  
8 that there was strong evidence that Lajqi intended to  
9 commit real acts of terrorism, and therefore, justified  
10 the variance to 60 months.

11 **THE COURT:** Aren't the threats that are  
12 claimed to be made by your client largely uncontested in  
13 this case?

14 **MR. SHANKER:** No. They are absolutely  
15 contested. I mean, he is contesting that they were  
16 threats, that they are true threats. They are false  
17 statements, and that's the difference really.

18 I mean, he is saying, I didn't intend to hurt  
19 anybody. I made these stupid statements. I was talking  
20 to impress this undercover, this love interest, and he  
21 owns that, but he absolutely opposes that these are true  
22 threats, and there's evidence to support that.

23 **THE COURT:** Okay. I'm not sure I get the  
24 distinction. When he's talking about killing people in a  
25 church, you're argument is that he didn't mean it?

1                   **MR. SHANKER:** Exactly.

2                   **THE COURT:** But you're not really arguing  
3 that he didn't say --

4                   **MR. SHANKER:** I admit he made -- yeah, he  
5 made the statement, and your Honor, he made the statement  
6 about the church and the statement about the police  
7 officer, and they were isolated statements. He doesn't  
8 mention it again. So he talks about jihad with her  
9 multiple times, but that's the only time that those come  
10 up.

11                   But back to Lajqi, the other important thing there  
12 is that the court varied to 60 months in Lajqi because he  
13 also found that due process concerns about notice and the  
14 sentencing tail wagging the charging dog were alleviated  
15 for the following reasons:

16                   One, the -- first of all, the government preserved  
17 the request for an upward variance under Section 3553 at  
18 the time that the defendant entered his guilty plea, and  
19 again when the PSI came out, neither of which are present  
20 in this case.

21                   Also in Lajqi, he was an illegal alien when he  
22 committed the offenses of conviction, and therefore, the  
23 court found that he had diminished due process rights when  
24 it came to be sentenced on uncharged conduct. Of course,  
25 Khalil is a U.S. citizen.

1           The court also found it significant that the  
2 confidential informant in that case had been disclosed to  
3 the defense during the discovery process alleviating  
4 credibility concerns. In this case, not only we don't  
5 have the identity of the confidential informant, the  
6 government refused to tell us whether there were other  
7 informants involved in the case, and, you know, we don't  
8 know who else contacted him.

9           But in sum, the basis for the upward variance  
10 based on uncharged conduct in Lajqi, is just not  
11 comparable from a procedural or a substantive level to  
12 Khalil's case for all of these aforementioned reasons.

13           **THE COURT:** So that I'm clear, are you making  
14 a procedural challenge to the Court even considering an  
15 upward variance? Are you asking that you be given more  
16 time to prepare a response to that request, even though  
17 the government has been asking for this from the  
18 beginning, right?

19           **MR. SHANKER:** Well, from the beginning since  
20 it filed its memorandum?

21           **THE COURT:** Right, prior to the sentencing  
22 hearing that we last had.

23           **MR. SHANKER:** Yes. So no, my procedural  
24 challenge is that first of all, that they've waived the  
25 various by not objecting to the Pre-Sentence Report. They

1 have waived it.

2 I think more importantly, they failed to meet the  
3 burden of proof to obtain the variance that it's  
4 requesting.

5 I mean, we have -- I've tried to not just lay out  
6 the facts in this case as they've come in, but also, you  
7 know, looking at these other cases that are very  
8 comparable.

9 The Gregerson case, you know, his guidelines are  
10 37 to 46 months with a cap of 60, and his facts are  
11 shockingly more incriminating than Khalil's case.

12 **THE COURT:** When you say a cap of 60, you  
13 mean the government agreed and the defendant agreed that  
14 any sentence up to 60 would be -- would be within the  
15 range by which the government would be precluded from  
16 withdrawing and the defendant likewise?

17 **MR. SHANKER:** Could not appeal.

18 **THE COURT:** Right.

19 **MR. SHANKER:** But it's based on --

20 **THE COURT:** Sixty was above the advisory  
21 range in that case.

22 **MR. SHANKER:** That's true, and basically what  
23 happened was the government preserved -- and I've admitted  
24 these into evidence, both of these Rule 11 agreements,  
25 your Honor -- but with Gregerson they preserved very

1 specifically -- which didn't happen here -- but they  
2 preserved an enhancement that they were seeking under the  
3 guidelines that move it to 60 months.

4 **THE COURT:** So Mr. Waterstreet distinguishes  
5 that, as well as the Lanton case, as distinguishable  
6 because of the cooperation that was promised by the  
7 defendant largely.

8 **MR. SHANKER:** I don't know anything about any  
9 cooperation, and there's not the standard language in the  
10 Rule 11 that would make reference to any other agreement.  
11 So I don't know if there is or is not.

12 **THE COURT:** So if we don't know, how do I  
13 treat that as a -- supporting your argument is essentially  
14 that the -- these are comparable for purposes of  
15 determining whether an unwarranted disparity in a given  
16 sentence would exist, right?

17 **MR. SHANKER:** Well, we have the four corners  
18 of the agreement, and I think that alone is telling.

19 Now certainly he could get a below guideline range  
20 sentence if there is a 5K in the case. That happens, but  
21 this is just based on his plea. That agreement, the four  
22 corners of that agreement, are about his plea to that  
23 charge. And remember, he was actually charged with  
24 possession of destructive devices with the intent to cause  
25 bodily harm, and, you know, actually appended to the



1 agreement is the stunning list of weaponry that he  
2 possessed, and what we know about Mr. Gregerson is that he  
3 had these connections. He had real connections. He made  
4 similar statements, but he apparently was either able to  
5 back it up or intended to back it up, one of the two,  
6 unlike Mr. Rayyan.

7 And Mr. Lanton's guideline range was 15 to 21  
8 months, and it was only that high because he had three  
9 prior felony convictions, and again, this is somebody that  
10 threatened to bomb a police funeral while it was happening  
11 on a public Facebook page. So I mean, it was clearly  
12 intended to scare people.

13 Khalil's statements were private with this  
14 undercover, and they've certainly come back to haunt him,  
15 but, your Honor, he didn't intend to hurt anybody.

16 Your Honor, when we look at all of these cases,  
17 including Lajqi as well, when we look at the reports of  
18 the two government experts, and when we look at Judge  
19 Strong's opinion, when we look at the results of multiple  
20 search warrants, all the computers that were searched, all  
21 the uncontested facts about the undercover operation,  
22 which basically commodified a young man's desire for love  
23 into an inducement to join a jihad operation, I think,  
24 your Honor, the guideline range is appropriate. It allows  
25 for a sentence that is not greater than necessary, and it

1 takes into account the detailed findings of psychologists  
2 who have spent far more time with Mr. Rayyan frankly than  
3 any of us, and this is their expertise.

4 And so, your Honor, I respectfully request a  
5 sentence of 15 months.

6 Thank you, your Honor.

7 **THE COURT:** All right. Thank you, Mr  
8 Shanker.

9 - - -

C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

\_\_\_\_\_  
Ronald A. DiBartolomeo, CSR  
Official Court Reporter

\_\_\_\_\_  
Date

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